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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Scott McIntyre,

10 Plaintiff,

11 v.

12 Arizona Board of Regents (ABOR); Arizona  
13 State University (ASU), Carla Harclerod,  
14 Executive Director, ASU at Lake Havasu;  
15 Sukhwant Jhaj, Dean of University College;  
16 Michael Crow, President of ASU; Nancy  
17 Gonzales, Provost; Erin Ellison, Director,  
Office of Equity and Inclusion; Samantha  
Blevins, ABOR Counsel;

Defendants.

No. CV-24-08151-PCT-DGC

**ORDER**

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19 Plaintiff Scott McIntyre, proceeding pro se, brings an employment discrimination  
20 complaint. Doc. 1. Defendants Arizona Board of Regents (“ABOR”), Arizona State  
21 University (“ASU”), Carla Harclerod, Sukhwant Jhaj, Michel Crow, and Nancy Gonzales  
22 have filed a partial motion to dismiss under Rule 12(b)(6).<sup>1</sup> Doc. 21. The motion is fully  
23 briefed and no party requests oral argument.<sup>2</sup>

24 <sup>1</sup> Defendants Erin Ellison and Samantha Blevins have not been served with process.  
25 *See* Doc. 17. Defendants’ motion states that Plaintiff has agreed not to pursue a claim  
26 against them (Doc. 21 at 3), and Plaintiff does not dispute this assertion in his response  
27 (Doc. 22). Because ASU is a non-jural entity, the parties also stipulate that the Title VII  
claims are asserted only against ABOR. Docs. 20, 23. They further stipulate that Plaintiff  
is no longer seeking relief under Executive Order 11246, 45 C.F.R. § 50, or the Belmont  
Report as suggested in his complaint. Docs. 20, 23.

28 <sup>2</sup> Plaintiff filed two responses, the second of which attached an exhibit related to the  
ADA. Docs. 22, 26. The Court addresses Plaintiff’s arguments in his first response, but  
has also reviewed the later-filed ADA exhibit.

1 Plaintiff's complaint contains a list of statutes, regulations, and executive orders as  
2 well as a timeline of alleged events. He does not set forth his claims in separately numbered  
3 paragraphs limited to a single set of circumstances or assert separate counts for each claim  
4 based on a separate transaction or occurrence, as required. *See* Fed. R. Civ. P. 10(b). In  
5 deciding Defendants' motion, the Court has construed Plaintiff's allegations liberally. As  
6 explained below, the Court will grant the motion.

7 **I. Background.**

8 The complaint contains the following factual allegations. Plaintiff is a former  
9 faculty member at ASU. Doc. 1 at 2-3. In 2020, ASU implemented a policy requiring  
10 mandatory COVID testing and health reporting for students and staff. *Id.* In early January  
11 2021, Plaintiff told his supervisor and other university officials that he thought the policy  
12 was unethical and potentially illegal. *Id.* at 3. He requested a religious exemption from  
13 the policy on January 22, 2021, which was denied on January 27, 2021. *Id.* Plaintiff made  
14 a request for religious exemption from ASU's COVID vaccination requirement on  
15 October 21, 2021. *Id.* The request was denied on November 5, 2021. *Id.* Plaintiff filed  
16 an Equal Employment Opportunity Commission ("EEOC") Pre-Charge Inquiry regarding  
17 this denial the same day. *Id.* at 4.

18 In May 2023, ASU notified Plaintiff that his contract would not be renewed. *Id.*  
19 at 5. He filed a Charge with the EEOC on August 2, 2023, alleging that ASU discriminated  
20 against him on the basis of his religion and retaliated against him for opposing the  
21 university's COVID policies. Doc. 21-2 at 2-3. Plaintiff's employment was terminated on  
22 May 15, 2024. Doc. 1 at 6. He received a Notice of Right to Sue from the EEOC on  
23 June 10, 2024 and filed this lawsuit on July 29, 2024. *Id.* at 1, 6.

24 **II. Rule 12(b)(6) Standard.**

25 Dismissal for failure to state a claim under Rule 12(b)(6) is appropriate when the  
26 complaint lacks a cognizable legal theory or fails to allege facts sufficient to support its  
27 theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). A complaint  
28 that sets forth a cognizable legal theory will survive a motion to dismiss if it contains

1 “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its  
 2 face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*,  
 3 550 U.S. 544, 570 (2007)). A claim has facial plausibility when the plaintiff pleads “factual  
 4 content that allows the court to draw the reasonable inference that the defendant is liable  
 5 for the misconduct alleged.” *Id.* The Court treats all allegations of material fact in the  
 6 complaint as true and construes them in the light most favorable to Plaintiff. *Cousins v.*  
 7 *Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009).

### 8 **III. Title VII Claim.**

9 Plaintiff’s complaint and EEOC Charge indicate that his Title VII claim is based on  
 10 religious discrimination and retaliation. Docs. 1 at 2, 21-2 at 2.<sup>3</sup> Defendants argue that  
 11 Plaintiff’s discrimination and retaliation claims are time-barred because they were brought  
 12 more than 300 days after the allegedly adverse actions, with the exception of the non-  
 13 renewal of Plaintiff’s contract. Doc. 21 at 5-6.

#### 14 **A. Religious Discrimination.**

15 “A charge under [Title VII] shall be filed by or on behalf of the person aggrieved  
 16 within three hundred days after the alleged unlawful employment practice occurred[.]” 42  
 17 U.S.C. § 2000e-5(e)(1). Plaintiff’s EEOC Charge was filed on August 2, 2023. Doc. 21-2  
 18 at 2. As a result, claims arising out of acts that occurred before October 6, 2022 (300 days  
 19 before the EEOC Charge) are time-barred. 42 U.S.C. § 2000e-5(e)(1); *see Nat’l R.R.*  
 20 *Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) (“Each discrete discriminatory act  
 21 starts a new clock for filing charges alleging that act. The charge, therefore, must be filed  
 22 within the . . . 300-day time period after the discrete discriminatory act occurred.”); *Lyons*  
 23 *v. England*, 307 F.3d 1092, 1108 (9th Cir. 2002) (“We hold that appellants’ pre-limitations  
 24 period claims, based on the alleged discriminatory assignment of details, are time-barred  
 25 for the reasons set forth by the Supreme Court in *Morgan*.”). Thus, Plaintiff’s  
 26 discrimination claims regarding the denial of religious exemption from the university’s

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 28 <sup>3</sup> Plaintiff does not identify his religion in documents submitted to the Court or in  
 his EEOC Charge. Doc. 21-2.

1 testing and health reporting policy on January 27, 2021, and the denial of religious  
2 exemption from the university's vaccination policy on January 8, 2022, are time-barred.

3 **B. Retaliation.**

4 Title VII also “precludes recovery for discrete acts of . . . retaliation that occur  
5 outside the statutory time period.” *Morgan*, 536 U.S. at 105. Retaliation claims arising  
6 out of acts that occurred before October 6, 2022 are therefore also time-barred. *See id.*;  
7 *Manatt v. Bank of Am.*, 339 F.3d 792, 800 (9th Cir. 2003) (“Because Manatt did not file  
8 the state complaint within 300 days of the transfer, her retaliation claim is untimely under  
9 Title VII.”) (citing 42 U.S.C. § 2000e-5(e)(1)).<sup>4</sup>

10 **IV. ADA Claim.**

11 Plaintiff alleges violation of Subchapter IV of the Americans with Disabilities Act  
12 (“ADA”), 42 U.S.C. § 12203, specifically, the anti-retaliation provision. Doc. 1 at 1.  
13 Plaintiff admits that he is not disabled, but claims that he “‘aided or encouraged . . . other  
14 individual[s]’ to exercise rights under the ADA” when he questioned the university’s  
15 policies regarding COVID testing and vaccination and communicated with employees and  
16 students about seeking accommodations under the ADA. Doc. 22 at 4-5. Even if this  
17 conduct would be protected by the ADA, however, the statute’s anti-retaliation provision  
18 is subject to the same exhaustion requirement as Plaintiff’s Title VII claim. *See* 42 U.S.C.  
19 § 12203(c); 42 U.S.C. § 12117(a). Plaintiff did not include any ADA claim in his EEOC  
20 Charge. The pre-printed Charge’s box for “DISABILITY” discrimination is not checked  
21 (while the boxes for religious discrimination and retaliation are checked), and the Charge’s  
22 explanation of Plaintiff’s claim says nothing about disability and makes no reference to the  
23

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25 <sup>4</sup> Plaintiff asserts that there are other timely adverse actions, including negative  
26 performance evaluations and reductions in merit pay. Doc. 22 at 3-4. Defendants contend  
27 that the only actionable adverse action after October 6, 2022 is the nonrenewal of Plaintiff’s  
28 contract in May 2023. Doc 21 at 7. Some of Defendants’ arguments require a close look  
at factual issues, such as the content of Plaintiff’s 2023 performance evaluation and  
surrounding circumstances. *See* Doc. 27 at 3. Such close factual inquiries are not  
appropriate at the motion to dismiss stage, where the Court’s decision must be based on  
facts alleged in the complaint.

1 ADA. *See* Doc. 21-2 at 2-3. Plaintiff therefore did not administratively exhaust the ADA  
 2 claim before bringing suit and the claim must be dismissed.<sup>5</sup>

### 3 **V. RFRA Claim.**

4 Plaintiff lists the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C.  
 5 § 2000bb, as a basis for his suit. Doc. 1 at 1. RFRA prevents government entities and  
 6 actors from “substantially burden[ing] religious exercise without compelling justification.”  
 7 42 U.S.C. § 2000bb(a)(3). Defendants correctly note, however, that RFRA applies only to  
 8 the federal government. *City of Boerne v. Flores*, 521 U.S. 507, 533-36 (1997) (holding  
 9 that RFRA is unconstitutional as applied to state and local government action). Defendants  
 10 are state entities and actors who are not subject to suit under RFRA.

11 To the extent Plaintiff implies that Arizona’s enactment of state legislation in  
 12 support of RFRA means the Court may apply RFRA in this case, the Court does not agree.  
 13 Doc. 22 at 5. The state statute Plaintiff cites, A.R.S. § 41-1493.01(D), creates a separate  
 14 right of action for state or local government violations of an individual’s freedom of  
 15 religion. It does not permit state and local governments to be sued under RFRA.

16 Plaintiff suggests that he wishes to amend his complaint to allege a violation of  
 17 A.R.S. § 41-1493.01. Doc. 22 at 5. “A pro se litigant must be given leave to amend his or  
 18 her complaint unless it is absolutely clear that the deficiencies of the complaint could not  
 19 be cured by amendment.” *Karim-Panahi v. L.A. Police Dep’t*, 839 F.2d 621, 623 (9th Cir.  
 20 1988). Defendants contend that any such amendment would be futile because Arizona law  
 21 requires a plaintiff seeking damages to serve a notice of claim on the public entity or person  
 22 against whom the cause of action will be brought within 180 days of when the cause of  
 23 action accrues. *See* A.R.S. § 12-821.01. But Plaintiff does not make a formal motion to

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24 <sup>5</sup> The Court can consider Plaintiff’s EEOC Charge in ruling on this motion to  
 25 dismiss because Plaintiff specifically refers to it in his complaint as setting forth the basis  
 26 of his claim and does not dispute the authenticity of the copy of the Charge attached to  
 27 Defendants’ motion to dismiss. Docs. 1 at 2; 22 n.1; *see also* 1 Gensler, Federal Rules of  
 28 Civil Procedure, Rules and Commentary, Rule 12 at 354-55 (2023) (“[T]he court may  
 consider documents not attached to the complaint if the complaint specifically refers to  
 them, they are central to the claim, and their authenticity is not in dispute.”). As noted, the  
 EEOC Charge does not assert an ADA violation. The Charge does refer to an  
 “accommodation” – a word frequently used in ADA claims – but makes clear that this is a  
 “religious accommodation” Plaintiff was denied. *See* Doc. 21-2 at 2-3.

1 amend, and Defendants' assertion that he did not serve a notice on any Defendant is a  
 2 factual matter outside the pleadings that the Court cannot consider on this motion to  
 3 dismiss. The Court therefore will not bar Plaintiff from filing a motion to amend his  
 4 complaint.<sup>6</sup>

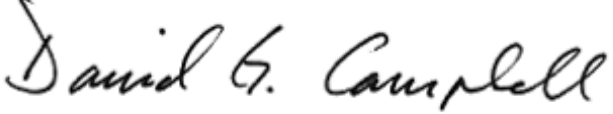
5 **IT IS ORDERED:**

6 1. Defendants' motion to dismiss (Doc. 21) is **granted**. Plaintiff's untimely  
 7 Title VII discrimination claims are dismissed, as are his ADA and RFRA claims. The  
 8 timely Title VII claims against ABOR remain. Because the Court approved the parties'  
 9 stipulation that Plaintiff's Title VII claims are asserted only against ABOR (Docs. 20, 23),  
 10 the other Defendants who brought the motion (ASU, Carla Harclerod, Sukhwant Jhaj,  
 11 Michael Crow, and Nancy Gonzales) are dismissed from this case. The claims against Erin  
 12 Ellison and Samantha Blevins are also dismissed in light of Plaintiff's failure to serve them.

13 2. The Court will set a Rule 16 Case Management Conference by separate  
 14 order. Plaintiff's pending motion for summary judgment (Doc. 9) will be discussed at the  
 15 conference. *See* Doc. 11.

16 3. Plaintiff's motion to amend the complaint, if he elects to file one, should be  
 17 filed within 20 days of this order. Plaintiff must comply with Federal Rule of Civil  
 18 Procedure 15 and Local Rule of Civil Procedure 15.1, which can be found on the Court's  
 19 website.

20 Dated this 22nd day of January, 2025.

21 

22 David G. Campbell  
 23 Senior United States District Judge  
 24

25 <sup>6</sup> Plaintiff's response to the motion to dismiss states in a footnote that Plaintiff has  
 26 been locked out of his ASU computer for some time, the computer contains information  
 27 relevant to this case, and Defendants have refused to grant him access despite multiple  
 28 requests. Doc. 22 at 3 n.2. Plaintiff asks the Court to consider this an act of spoliation. *Id.*  
 Plaintiff can request information stored on his computer during discovery. *See* Fed. R. Civ.  
 P. 34. Spoliation sanctions related to electronically stored information are governed by  
 Rule 37(e). Plaintiff does not address this standard and his request is denied. Plaintiff  
 should seek to obtain the information in discovery before seeking sanctions.